BRUSSELS I 9 MARCH 2020

1. EU Commission Publishes Tax Evasion & Tax Simplification Roadmap

The European Commission has published a Roadmap concerning its Action Plan to fight tax evasion and simplify taxation, as well as for its external strategy for tax good governance. The Roadmap indicates that following a conference on the tax challenges in the digital era, scheduled to take place in April 2020, public consultations will take place concerning follow-up actions.

The Roadmap lists the following as steps to be taken concerning tax evasion: strengthening cooperation tools amongst tax administrations at Union level; introducing new digital solutions to move to real time sharing of information and improve data analytics; for tax data to be provided directly to tax authorities from digital platforms (concerning which a legislative proposal is specifically foreshadowed); and improved cross-border recovery and cooperation agreements.

In relation to simplifying taxation, the Roadmap details that the following actions may be taken: the introduction/improvement of mechanisms concerning cross-border tax disputes, the simplification and modernisation of VAT rules and procedures for withholding taxes in investment in the Single Market; the improvement of cooperative compliance; the introduction of IT solutions to levy tax in real time; and the reinforcement of the EU position with third countries, particularly by way of the external strategy for tax good governance, which may include defensive measures being introduced, technical assistance being offered or agreements being made with third countries.

The Commission will publish the Action Plan together with its initial legislative proposals in June 2020.

2. Turnover Taxes Not Discriminatory: ECJ Decisions in *Tesco* & *Vodafone*

On 3 March 2020, the European Court of Justice delivered its judgments in Cases C-323/18, *Tesco-Global Áruházak Zrt. v Nemzeti Adó- és Vámhivatal Fellebbviteli* and C75/18, Vodafone Magyarország Mobil Távközlési Zrt. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága, two Hungarian cases concerning whether or not steeply progressive turnover taxes which targeted the retail and telecommunication sectors were discriminatory or contrary to the freedom of establishment.

The Court in both cases held that *"Articles 49 and 54 TFEU must be interpreted as not precluding the legislation of a Member State that establishes a steeply progressive tax on turnover, the actual burden of which is mainly borne by undertakings controlled directly or indirectly by nationals of other Member States or by companies that have their registered office in another Member State, due to the fact that those undertakings achieve the highest turnover in the market concerned."*

Notably, the Court held in *Vodafone*, at paragraph 52, that *"The fact that the greater part of such a special tax is borne by taxable persons owned by natural persons or legal persons of other Member States cannot be such as to merit, by itself, categorisation as discrimination".*

The Commission has issued a statement concerning the judgments, stating: *"The Commission takes note of the ECJ's preliminary rulings concerning the compatibility of the sectoral taxes levied in Hungary on the turnover of retail and telecommunications operators and undertakings with EU free movement rules. The Commission also takes note of the clarifications provided by the ECJ as to the admissibility of State aid questions in cases where taxpayers invoke the unlawfulness of taxes under State aid rules to avoid paying these taxes. The Commission will carefully examine the judgments."*

3. EU Green Deal - Energy Taxation & Carbon Border Adjustment Inception Impact Assessments

The EU Commission has published two inception impact assessments on the Energy Taxation Directive and Carbon Border Adjustment Mechanism as part of its work to progress the EU Green Deal.

As concerns the Energy Taxation Directive, the inception impact assessment sets out that a legislative proposal is planned for June 2021, which will aim to align the *"taxation of energy products and electricity with EU energy and climate policies"* and to update *"the scope and structure of rates as well as …use of optional tax exemptions and reductions by Member States".* An impact assessment concerning the proposal is being prepared, and an online public consultation concerning changes to the Directive will be carried out in Spring 2020.

A public consultation will also be carried out concerning the Carbon Border Adjustment Mechanism, which will aim to prevent carbon leakage caused by offshore production and carbon intensive imports, to ensure import prices reflect their carbon footprint, in order to achieve EU climate goals. In addition, technical consultations with specialised stakeholders and an impact assessment will be carried out by the Commission.

4. Advertisement Tax Declaration Requirements not Contrary to EU Law: ECJ Judgment in *Google Ireland v Hungarian Tax Administration*

On 3 March 2020, the Grand Chamber issued its judgment (based on a reference for a preliminary ruling per Article 267 TFEU) in Case C-482/18 *Google Ireland v Hungarian Tax Administration* related to the Hungarian advertisement tax.

Essentially, the Court follows AG Kokott's Opinion and declares that the obligation to submit a tax declaration imposed on non-resident companies for the purposes of Hungarian advertisement tax on turnover does not constitute a restriction on the freedom of establishment, i.e. Article 56 TFEU, in spite of the fact that Hungarian companies do not have such an obligation by law. The Court was not asked to rule on the legality of the turnover advertisement tax as such, but the Court notes however that *"it must be borne in mind that Article 56 TFEU precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within a Member State."* (*Austria v Germany*, C-591/17, para 135).

The Hungarian system of imposition of fines, however, was found to be in breach of Article 56 TFEU. In essence, the Hungarian law imposes fines on non-resident taxpayers within scope of the advertising tax, which increase incrementally for failure to register as a taxpayer liable for the tax and for failure to submit a tax return on time. This practice was found to be a restriction on the cross-border provision of services, which disproportionally affects foreign companies.

The Court ordinarily accepts that such a restriction of the fundamental freedoms might be justified by overriding reasons of public interests, such as the need to preserve the integrity of its tax regime, ensuring the effectiveness of fiscal supervision and the effective collection of tax, all of which were invoked by the Hungarian government. The Court did not accept such justifications in the present case on grounds of proportionality (para 49 of the judgment). The Court supported its decision citing factors such as disproportionality of the penalty in relation to the actual turnover of the company and discretion of the tax authority in relation to subsequent decreasing of the fine, all of which were found to be contrary to the freedom of establishment.

5.

Portugal Ratifies OECD BEPS MLI

Portugal has deposited its instrument of ratification to the OECD's Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.

The multilateral tax treaty allows jurisdictions to update their existing double tax treaties and transpose measures agreed in the BEPS project without further need for bilateral negotiations. It now extends to over 1,650 bilateral tax treaties.